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No. 09-

IN THE
# Supreme Court of the United States

ALLIANCE SHIPPERS, INC.,

*Petitioner,*

*v.*

PENOBSCOT FROZEN FOODS, INC., FREDERICK D. STARRETT, III, individually and as an agent of PENOBSCOTT FROZEN FOODS, INC. AMERICOLD LOGISTICS, L.L.C., ASSOCIATED GROCERS, INC., ASSOCIATED WHOLESALE GROCERS, INC., BRUNO'S SUPERMARKETS, INC., CHENEY BROTHERS, INC., GORDON FOOD PRODUCTS CORP., McLANE COMPANY, INC., PIGGLY-WIGGLY CO., WINN-DIXIE STORES, INC., PENOBSCOT McCRUM, L.L.C., and COUNTY SUPER SPUDS, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Is a freight transportation company's claim for unpaid freight transportation governed by federal law?

2. Is the federal statutory right of a federally regulated freight transportation company protected from being vitiated by the application of state common law governing the integrity of the corporate form itself? Stated another way, should federal common law apply to determine whether a corporate successor is liable for interstate freight transportation?

## CORPORATE DISCLOSURE STATEMENT

Alliance Shippers, Inc. does not have a parent corporation nor owns 10% or more of any publicly held company.

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## OPINIONS AND ORDERS BELOW

In July, 2004, Petitioner/Plaintiff, Alliance Shippers, Inc. ("Alliance"), a freight transportation company, instituted an action in the Superior Court of New Jersey, Law Division, against its customer/shipper, Penobscot Frozen Foods, Inc. ("Penobscot"), Penobscot's successor, Penobscot McCrum, LLC ("McCrum"), and several consignees (*i.e.*, Penobscot's customers), entitled *Alliance Shippers, Inc. v. Penobscot Frozen Foods, et al.*, Docket No. MID-L-4374-04. McCrum removed this action to the U.S. District Court for the District of New Jersey on grounds that the Court had subject matter jurisdiction over Alliance's claims. The entire case was thereafter remanded *sua sponte* to the State Court.[1] 33a, 35a.

Alliance petitions this Court for a writ of certiorari of the February 2, 2009 decision of the New Jersey Superior Court, Appellate Division, Docket No A-4441-06T5 (1a), affirming the October 6, 2006 oral decision of the Hon. Alexander P. Waugh, Jr. (New Jersey Superior Court, Law Division) granting McCrum's motion for partial summary judgment on successor liability under Docket No. MID-L-4374-04. 27a. An order in accordance with Judge Waugh's decision was filed on November 1, 2006. 24a.

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1. While the case was in the District Court, Alliance settled with the consignees, save for one which filed for bankruptcy. Alliance also obtained a default judgment against Penobscot, which thereafter filed a Chapter 7 Bankruptcy Petition.

On September 11, 2009, the New Jersey Supreme Court denied Alliance's petition for certification under Docket No. C-36, September Term 2009, 63,982. (45a).

All of the above orders and decisions were unreported.

## JURISDICTION

As stated above, on October 6, 2006, the Hon. Alexander P. Waugh, Jr. (New Jersey Superior Court, Law Division) granted McCrum's motion for partial summary judgment on successor liability under Docket No. MID-L-4374-04. 24a. An order in accordance with the decision was entered on November 1, 2006. 27a. On February 2, 2009, the New Jersey Superior Court, Appellate Division, Docket No A-4441-06T5 (1a) filed an opinion affirming Judge Waugh's order and decision. On September 11, 2009, the New Jersey Supreme Court, denied Alliance's petition for certification under Docket No. C-36, September Term 2009, 63,982. (45a). Therefore, this matter gives rise to a federal question pursuant to 28 *U.S.C.* §§ 1331 and 1337 and this Court has jurisdiction under 28 *U.S.C.* § 1254 (1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Alliance's primary claim in this case is exclusively governed by 49 *U.S.C.* § 14706, the Interstate Commerce Termination Act ("ICTA"), and also involves: 49 *U.S.C.* §§ 13706, 13708, § 13709, 10101, 11102, 13101(A)(1)(C), 13102(13), 13701, 13706, 13708, 13709, 14101(b)(2), and 14706.

## STATEMENT OF THE CASE

The Orders of the New Jersey Superior Court, left undisturbed by the New Jersey Supreme Court, did not apply federal common law when granting summary judgment on the successor liability of defendant, McCrum. Instead, Maine law was applied. Consequently, Alliance's federal statutory right it originally had against Penobscot, which continued against McCrum, was vitiated. The Orders left Alliance without a meaningful remedy and is inconsistent with and contrary to important policies of Congress when enacting ICTA.[2]

Alliance is a New Jersey-based freight transportation company regulated by ICTA and regulations promulgated thereunder. See Legal Argument, Point I, *infra*. Alliance arranged for the transportation of Penobscot's potato products from Maine to various destinations throughout the country. Most of the individual bills of lading, issued by Penobscot, contained multi-stop deliveries to different consignees and exceeded the sum of $10,000. At the same time, and unbeknownst to Alliance, Penobscot was failing financially and its assets were being foreclosed and sold by its secured lender, Key Bank (the "bank"). 3a-4a.

Penobscot's major potato supplier, County Super Spuds, Inc. ("County"), engaged in substantial negotiations with the bank to either acquire the bank's liens or enter into an auction bid agreement. 3a-4a.

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2. Alliance's other claims against McCrum, under the equitable doctrines of quantum merit and unjust enrichment, were partially successful below. These claims are not part of this Petition.

The bank's lien on Penobscot's personalty was subject to substantial super-priority liens (ahead of the bank) held by potato suppliers under the Federal Perishable Commodities Agricultural Act, 7 *U.S.C.* 499e *et seq.* (the "PACA liens"). The PACA liens did not attach to Penobscot's realty, which included desirable waterfront acreage along the Penobscot River in re-gentrified Belfast, Maine. Hence, a forced sale of Penobscot's realty would be free and clear of PACA liens. On the other hand, a forced sale of Penobscot's personalty and the proceeds thereof would be subject to and encumbered by the PACA liens.

The bank scheduled a public auction for April 29, 2004. Shortly before, County threatened the bank that County would stop supplying Penobscot with potatoes and potentially cause the shut-down of Penobscot's operations, unless County's purchase offer was accepted by the bank. Conversely, the bank threatened County with canceling the auction[3] and selling Penobscot's realty separately from the personalty, unless the bank's counter-offer was accepted.

On the eve of the auction, the bank and County entered into a secret bid agreement requiring County to bid a certain amount and, if successful, to pay certain debts of Penobscot. The auctions were conducted without *disclosure* of the bid agreement. County was the only *bona fide* bidder and it assigned its successful bid to its alter-ego, McCrum. 3a-4a.

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3. Two separate auctions were held because Penobscot's reality was located in two separate towns.

Amongst the assets acquired by McCrum were the accounts receivables. 4a. Many of Penobscot's unpaid invoices related to products delivered by Alliance. 4a-5a, 11a. Penobscot's custom and practice was to add Alliance's freight charges to the price of the products and combine the total as one amount in the invoice. In effect, Penobscot "passed through" its freight costs to its customers. When Penobscot's customers made their own transportation arrangements, no "pass-throughs" occurred. 5a, 11a.

Four (4) significant events occurred after the auction. First, McCrum continued the Penobscot business, uninterrupted, at the same facilities and with the same employees, products, customers and vendors, etc. Second, McCrum paid debts of Penobscot substantially beyond its obligations under the secret bid agreement. Third, McCrum collected on all outstanding Penobscot invoices, which included Alliance's unpaid freight transportation charges. Fourth, Alliance, unaware of the McCrum acquisition, continued rendering freight transportation services, until McCrum belatedly advised Alliance that McCrum would not pay Alliance for any pre-auction dated invoices. 4a-5a, 11a.

McCrum and Alliance moved and cross-moved for summary judgment. On the claim of successor liability against McCrum for Penobscot's non-payment of freight charges (totaling approximately $265,000), the trial court applied Maine law and granted summary judgment to McCrum. 27a-32a. Other rulings, including subsequent trial Court rulings, have no bearing on this petition.

At the crux of this Petition is Alliance's contention that it's interstate freight charge claim is subject to federal statutes and regulations. Thus, federal common law should apply to successor liability. These issues were raised early in this litigation before it was remanded from federal court to state court. They were also raised in Alliance's initial brief and during oral argument at the summary judgment motion stage. The state trial court did not grasp the importance of these issues and instead focused on engaging in a traditional choice of law analysis of the bank's foreclosure sale and the secret bid agreement without due consideration of the federal statutory claim involved the application of federal common law. 6a, 16a-17a.

The opinion of the Superior Court, Appellate Division, contained the same fallacies. 16a-17a. The New Jersey Supreme Court, like this Court, not a Court of correction, did not find a significant question of public importance, *N.J. Court Rule* 2:12-5, and denied Alliance's petition for certification.

## REASONS FOR GRANTING THE PETITION

This case presents two exceptionally important questions: (1) Is a freight transportation company's claim for unpaid freight transportation still governed by federal law and, if so: (2) Should a state court apply federal common law regarding corporate successor liability for the federal claim of unpaid freight transportation under ICTA?

This Court should grant certiorari to resolve these questions and dispositively deal with the inconsistencies

that presently exist in various federal district court decisions. *S. Ct. R.* 10(c). Indeed, no Circuit has specifically addressed the first question. However, Circuit decisions addressing successor liability have applied federal common law to determine liability for federal claims. These questions are of paramount importance to Congress' vision and intent that the transportation policies in the United States encourage sound economic conditions. 49 *U.S.C.* 13101(a)(1)(c).

With respect to the first issue, in a recent unpublished opinion, the Sixth Circuit has stated that a claim for freight charges due and owing for goods transported across state lines is subject to federal jurisdiction under 49 *U.S.C.* § 13501(c). *CGH Transport, Inc. v. QuebecCor World, Inc.*, 261 *Fed Appx.* 817, 821 (6th Cir. 2008).

Notwithstanding *CGH*, *infra*, there is conflicting authority from the district courts as to whether *Thurston Motor Lines, Inc. v. Jordan K. Rand, LTD.*, 460 *U.S.* 533, 103 *S.Ct.* 1343, 75 *L.Ed.2d* 260 (1983), which held federal question jurisdiction existed over a carrier's "simple contract-collection action," remains applicable after the transportation industry was deregulated pursuant to ICTA. *Compare Old Dominion Freight Line v. Allou Distributors, Inc.*, 86 *F.Supp.2d* 92 (E.D.N.Y. 2000)(holding carrier's action for freight charges allegedly owed for interstate transportation services brought pursuant to 28 *U.S.C.* Sec. 1337(a) provided the basis for the district court to exercise original jurisdiction); *Artic Express, Inc. v. Del Monte Fresh Produce NA, Inc*, 366 *B.R.* 786 (S.D. Ohio 2007)(holding that a shipper's statute of limitations

defense under ICTA to a carrier's collection claim creates federal subject matter jurisdiction); *with Transit Homes of America v. Homes of Legend, Inc.*, 173 *F. Supp.*2d 1185 (N.D. Ala. 2001)(holding Carmack Amendment to ICTA, 49 *U.S.C.* § 14706, provides a federal cause of action against carriers but does not provide federal subject matter jurisdiction for freight charge claim under contract); *Central Transport Int'l v. Stirling Seating, Inc.*, 356 *F. Supp.* 2d 786 (E.D. Mich. 2005)(same).

The District Court below in this case, relying upon *Central Transport*, ordered a remand to the New Jersey Superior Court. 33a, 35a.

However, the underlying fundamental federal policy of ICTA is to create certainty fostering an environment of sound economic conditions among carriers. 49 *U.S.C.* 13101(a)(1)( C). State common law, as to corporate successor liability, should be preempted by federal common law, discussed *infra*. Successor liability under federal common law is not surprisingly consistent with the law established in a majority of states (including New Jersey). *Louisiana Pacific Corp. v. Asarco*, 909 *F.*2d. 1260, 1263-1264 (9th Cir. 1990). Thus, federal common law applies where federal rights and remedies are at stake. *Id.*

The "Traditional Rule of Successor Liability" is invoked where the purchasing corporation is a continuation of the selling corporation. *Cf. Louisiana Pacific Corp. v. Asarco, supra*, 909 *F.2d* at 1263-1264 *with* the New Jersey Appellate Division opinion below at 15a-16a (citing *Jackson v. N.J. Mfrs. Ins. Co.*, 407

*A.*2d 1204 (N.J. App. Div. 1979). Application of federal common law would have resulted in McCrum being found liable for Penobscot's debts due and owing to Alliance.

This traditional rule is contrasted with Maine common law as stated by the New Jersey Appellate Division at 16a (citing *Div. of Bureau of Labor Stds. v. Diamond Brands, Inc.* 588 *A.2d* 734 (Me 1999), which requires the absence of a *bona fide* arms-length transaction to find liability against a corporate successor. Improper application of Maine law by the New Jersey State courts below left Alliance without recovery for its federal statutory claim.

The petition should be granted to prevent the improvident application of state common law, as opposed to federal common law, regarding corporate successor liability when important fundamental federal policies are involved. Specifically, a broad application of the lower courts' decisions will unduly interfere with the Congressional Policy of maintaining sound economic conditions among carriers providing interstate transportation services throughout the United States. This is essential in order to foster a strong national economy. 49 U.S.C. 13101(a)(1)( C).

## LEGAL ARGUMENT

### POINT I

### THIS CONTROVERSY IS GOVERNED BY FEDERAL LAW RAISING FEDERAL QUESTIONS PURSUANT TO 28 *U.S.C.* §§1331 AND 1337 BECAUSE THIS MATTER "ARISES UNDER" THE CONSTITUTION, LAWS, OR TREATIES OF THE UNITED STATES, FOR INTERSTATE FREIGHT TRANSPORTATION

This controversy presents questions over which this Court has original jurisdiction under 28 *U.S.C.* §§1331 and 1337. Therefore, this matter "arises under" the Constitution, laws, or treaties of the United States. Specifically, the Complaint alleges, among other things, a dispute over "interstate commerce". It is indisputable that the complaint concerned interstate freight transportation services.

Since a motor carrier, freight forwarder and freight broker are licensed by the federal government, Alliance's "motor transportation" and its "charges" and "services" are exclusively governed by an Act of Congress, the Interstate Commerce Commission Termination Act of 1995, P.L. 104-88 ("ICTA"). Stated differently, since this action against Penobscot was a suit of a civil nature relating to "charges" for "motor transportation services" by a common carrier in interstate commerce, it is governed by the Interstate Commerce Act, 49 *U.S.C.* §§ 11102 and as amended by the ICC Termination Act of 1995 *P.L.* 104-88. This

provides the basis for subject matter jurisdiction pursuant to the "arising under" jurisdictional provisions of 28 *U.S.C.* §§ 1331 and 1337 as Acts of Congress regulating commerce.

In addition, most of the individual bills of lading issued by Penobscot exceeded the sum of $10,000. Thus, the federal court had original jurisdiction over this lawsuit pursuant to 28 *U.S.C.* 1337.

Federal law, specifically 49 *U.S.C.* §§ 13701, 13706, 13708 and 13709, also governs liability for payment of transportation freight rates, billing disputes and procedures for resolving claims for transportation freight charges. For example, 49, *U.S.C.* §§ 13701, entitled, "requirements for reasonable rates, classifications, through routes, rules, and practices for certain transportation," governs rates "charge[d]" for "motor transportation services" as alleged in the Complaint. Further, 49 *U.S.C.* § 13706, entitled "Liability For Payment of Rates," sets forth the Federal law and standards regulating the payment of freight charges. This is the subject of the Complaint. Moreover, 49 *U.S.C.* § 13708, entitled "billing and collection practices," regulates and governs Alliance's right to the freight charges that are the subject of the Complaint. Finally, 49 *U.S.C.* § 13709, entitled "Procedures For Resolving Claims Involving Unfilled, Negotiated Transportation Rates," is the federal law providing the procedure for addressing Alliance's allegations for freight charges due for motor carrier services as alleged in the Complaint.

This action solely involves unpaid freight transportation charges for interstate shipments. As set

forth above, ICTA is the governing statutory scheme for interstate freight transportation. ICTA provides that the **exclusive** remedy for a breach of contract with shippers by stating ". . . shall be an action in an appropriate state court or United States District Court, unless the parties otherwise agree." 49 *U.S.C.* 14101(b)(2). An "individual shipper" is any person who "owns the goods being transported[.]" 49 *U.S.C.* 13102(13). This would include Penobscot and McCrum, which purchased all of Penobscot's assets and collected on the latter's invoices, which included Alliance's unpaid freight charges. 4a-5a, 11a. Indeed, McCrum's own Notice of Removal was premised on "federal question" subject matter jurisdiction.

The public policy underlying ICTA states in pertinent part:

> Sec. 13101. Transportation policy
>
> (a) In General. — To ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to oversee the modes of transportation and — (1) in overseeing those modes —
>
> . . .

> **(C) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;**

49 *U.S.C.* 13101(a)(1)( C). (emphasis added) Uniformity of the law governing interstate transportation should require that federal law, rather than the law of any particular state, be applicable to determine the liability for interstate freight charges of either the primary responsible party (i.e. the customer) or the secondary responsible party (i.e. the customer's successor).

This Court has held that in the absence of a statute, regulation, bill of lading, or a contract between the parties which provides the contrary, the shipper is primarily liable for the freight charges. *Southern Pacific Transportation Co. v. Commercial Metal Co.*, 456 *U.S.* 336, 102 *S.Ct.* 1815, 1820, 72 *L.Ed.2d.* 114 (1982). Federal obligations due and owing to freight transportation companies should not be lost or compromised simply because the shipper's (or consignee's) successor is not liable for its predecessor's debts under state common law.

The Interstate Commerce Act, 49 *U.S.C.* §§ 10101, *et seq.* and 49 *U.S.C.* § 11102 and as amended by the ICC Termination Act of 1995 *P.L.* 104-88, as well as other applicable federal law, including but not limited to 49 *U.S.C.* §§ 13701, 13706, 13708 and 13709, all provide one uniform system and regime to govern liability for "charges" for "motor transportation services" of goods in interstate commerce.

Federal Law governs the rights, duties and obligations of the parties relative to the allegations in the Complaint. This matter, therefore, is one that gives rise to federal questions and is subject to federal subject matter jurisdiction under 28 *U.S.C.* §§ 1331 and 1337.

In accordance with this reasoning, the Seventh Circuit recognized:

> Hence this branch of interstate commerce was being subjected to such a diversity of legislative and judicial holdings ***that it was practically impossible for*** a shipper engaged in a business that extended beyond the confines of his own state, or ***a carrier whose lines were extensive, to know***, without considerable investigation and trouble, and even then oftentimes with but little certainty, ***what would be the carrier's actual responsibility as to goods delivered to it for transportation from one state to another.*** [citing Adams Express Co. v. Croninger, 226 U.S. 491, 506, 33 S.Ct. 148, 152, 57 L.Ed. 314 (1913)]. The Court recognized that the Carmack Amendment manifested Congress's intent "to take possession of the subject" and to prescribe uniform rules governing liability of carriers to shippers regarding interstate shipments. Id. at 506, 33 S.Ct. at 152.

*North American Van Lines, Inc. v. Pinkerton Sec. Systems, Inc.*, 89 *F.3d* 452 (7th Cir. 1996)(emphasis added). Likewise, in *Glass v. Crimmins Transfer Co.*,

299 *F. Supp.2d* 878 (C.D. Ill. 2004), the District Court noted:

> . . . The underlying principle [of the Carmack Amendment] is that ***the carrier is entitled to base rates upon value and that its compensation should bear a reasonable relation to the risk and responsibility assumed.*** The broad purpose of the federal act is to compel the establishment of reasonable rates and to provide for their *uniform* application.
>
> Preceding these cases, the Supreme Court had held consistently that federal law excludes all other rights and remedies with respect to interstate transportation agreements, *e.g.*, *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 *U.S.* 533, 535, 103 *S.Ct.* 1343, 75 *L.Ed.2d* 260 (1983), and that a carrier's rights and obligations, as defined by its published tariff, cannot be enlarged by any alleged tort of the carrier. *Maislin Indus. U.S. Inc. v. Primary Steel, Inc.*, 497 *U.S.* 116, 126, 110 *S.Ct.* 2759, 111 *L.Ed.2d* 94 (1990).
>
> . . .
>
> The purpose of this statute is to establish *uniform* federal guidelines designed in part to remove the uncertainty surrounding a carrier's liability when damage occurs to a shipper's interstate shipment. To permit a shipper to choose among various types of

> remedies would cause confusion and insurmountable problems and defeat the Act's purpose of eliminating uncertainty as to a carrier's liability by injecting uncertainty back into this area of transportation Congress has sought to regulate.

*Id.* At 885 (emphasis added).

Similarly, the same uniform approach should apply when seeking to recover monies due and owing for freight transported interstate. Notwithstanding this seemingly sensible approach, there appears to be only one Circuit that has confirmed, in *dictum*, that this approach is proper. However, there is a split of authority among a few District Courts as to whether such a claim is governed by federal law.

The Sixth Circuit and a few District Courts have held that federal jurisdiction exists under 49 *U.S.C.* 13501 with respect to a carrier's claim that goods were transported across state lines. *CGH*, *supra*, 261 *Fed. App.* at 821; *Old Dominion Freight Line*, *supra*, 86 *F. Supp. 2d.* at 92-94; *Arctic Express, Inc.*, *supra*, 366 *B.R.* 786.

Other District Courts have erroneously held that even though a shipper has a federal cause of action against a carrier, a carrier does not have a reciprocal federal claim against a shipper. *Transamerica Homes of America*, *supra*, 173 *F. Supp. 2d.* 1185; *Central Transport Int'l*, *supra*, 856 *F. Supp. 2d.* 786. These cases are inconsistent with Congress' stated purpose of sound economic conditions among carriers and should not be adopted by this court.

For all of these reasons, Alliance's claim for unpaid freight charges is governed by federal law.

## POINT II

## FOR PURPOSES OF CORPORATE SUCCESSOR LIABILITY, UNIFORMITY OF THE LAW FOSTERING THE CONGRESSIONAL POLICY OF SOUND ECONOMIC CONDITIONS MANDATES THAT THE RIGHTS OF A FEDERALLY REGULATED FREIGHT TRANSPORTATION COMPANY SHOULD NOT BE VITIATED BY THE APPLICATION OF STATE COMMON LAW GOVERNING THE INTEGRITY OF THE CORPORATE FORM ITSELF AS DISTINGUISHED FROM STATE COMMON LAW GOVERNING THE INTERNAL AFFAIRS OF A CORPORATION

### A. The Lower Court Decisions

The lower courts utilized a state common law choice of law analysis and focused on the foreclosure sale by the bank. The lower courts did not focus on the federal statutory rights of Alliance, even though it arranged for the transportation of interstate shipments. The New Jersey Superior Court, Appellate Division, stated:

> There is a conflict between the laws of New Jersey and Maine respecting the issue of successor liability. In New Jersey, the law can be summarized as follows:

> [W]here one company sells or otherwise transfers all of its assets to another company the latter is not liable for the debts and liabilities of the transferor, including those arising out of the latter's tortuous conduct, except where (1) the purchaser expressly or impliedly agrees to assume such debts and liabilities; (2) the transaction amounts to a consolidation or merger of the seller and purchaser; (3) the purchasing corporation is merely a continuance of the selling corporation, or (4) the transaction is entered into fraudulently in order to escape liability for such debts.
>
> [*Jackson v. N.J. Mfrs. Ins. Co.*, [400 A.2d 81, 84], 166 *N.J. Super.* 448, 454 (App. Div. 1979), *certif. denied*, 81 *N.J.* (1979).]

In Maine, the inquiry is simpler and generally protects the successor corporation from liability for the debts of its predecessor:

> [A]bsent a contrary agreement by the parties, or an explicit statutory provision in derogation of the established common law rule, a corporation that purchases the assets of another corporation in a *bona fide*, arm's-length transaction

> is not liable for the debts or liabilities of the transferor corporation.
>
> [*Dir. Of Bureau of Labor Stds. V. Diamond Brands, Inc.*, 588 *A.2d* 734, 736, (Me. 1991).]
>
> We agree with Judge Waugh that the analysis must properly focus on the foreclosure sale and not on the contract between Alliance and Penobscot.

15a-16a.

As a result, Maine common law was applied. This application resulted in the evisceration of Alliance's federal rights under ICTA against Penobscot and McCrum. Alliance could not collect from Penobscot because it was bankrupt. It was not permitted to recover from McCrum as Penobscot's successor under Maine common law.

For purposes of this Petition, Alliance does not challenge the lower courts' choice of law analysis between Maine and New Jersey common law.[4] Rather, the issue before this Court is whether federal common law on successor liability should have been applied. As explained below, *see* Point II. B. *infra*, federal common law is very similar to the New Jersey law, stated above, and, not surprisingly is also similar to the law in the majority of states.

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4. Alliance also does not challenge the lower court's finding of fact that the sale of the corporation was an arm's length transaction.

### B. Federal Rights Preempt State Corporate Law When It Involves the Integrity of the Corporation and Liability to Third Parties

This Court has addressed the issue of when a federal right can be impacted by state corporate law. The critical distinction in these cases depends upon whether the state law is governing the internal affairs of the corporation or whether state law is defining the integrity of the corporation.

In *Burks v. Lasker*, 441 U.S. 471, 99 S. Ct. 1831, 60 L.Ed.2d 404 (1979), this Court was confronted with a shareholders' federal statutory claim. It held the business judgment of the Board of Directors (under state common law) defeated the federal claim. Significantly, *Burks* reasoned as follows:

> Legal rules which impact significantly upon the effectuation of federal rights must, therefore, be treated as raising federal questions. . . . [citing cases] . . . Thus, "the overriding federal law applicable here would, where the facts required, control the appropriateness of redress despite the provisions of state corporation law . . . ." *J. I. Case Co. v. Borak*, *supra*, 377 *U.S.*, at 434, 84 *S.Ct.*, at 1561 (emphasis added).
>
> The fact that "the scope of [respondents'] federal right is, of course, a federal question" does not, however, make state law irrelevant. *De Sylva v. Ballentine*, 351 *U.S.* 570, 580, 76

> *S.Ct.* 974, 980, 100 *L.Ed.* 1415 (1956). . . . It is true that in certain areas we have held that federal statutes authorize the federal courts to fashion a complete body of federal law. *See Textile Workers v. Lincoln Mills*, 353 *U.S.* 448, 451, 456-457, 77 *S.Ct.* 912, 915, 917-918, 1 *L.Ed.*2d 972 (1957). Corporation law, however, is not such an area.

*Id.* at 477. The Supreme Court then held that the federal statutes at issue did not require that federal law displace state laws governing the powers of directors unless the state laws permit action prohibited by the Acts, or unless "their application would be inconsistent with the federal policy underlying the cause of action . . . ." *Id.* (*quoting*, *Johnson v. Railway Express Agency*, 421 *U.S.* 454, 465, 95 *S.Ct.* 1716, 1722, 44 *L.Ed.2d* 295 (1975). The *Burks* court further noted:

> Although "[a] state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation," . . . , **federal courts must be ever vigilant to insure that application of state law poses "no significant threat to any identifiable federal policy or interest . . . ."** *Wallis v. Pan American Petroleum Corp.*, 384 *U.S.* 63, 68, 86 *S.Ct.* 1301, 1304, 16 *L.Ed.2d* 369 (1966). . . . [citing cases] And, of course, this means that "unreasonable," *Wallis v. Pan American Petroleum Corp.*, *supra*, at 70, 86 *S.Ct.*, at 1305, or "specific aberrant or hostile state rules," *United States v. Little Lake Misere*

> *Land Co.*, 412 *U.S.* 580, 596, 93 *S.Ct.* 2389, 2398, 37 *L.Ed.2d* 187 (1973), will not be applied. *See, e. g., Levitt v. Johnson*, 334 *F.2d* 815, 819-820 (CA1 1964). The "consistency" test guarantees that "[n]othing that the state can do will be allowed to destroy the federal right," *Board of Comm'rs v. United States*, 308 *U.S.*, at 350, 60 *S.Ct.*, at 288, and yet relieves federal courts of the necessity to fashion an entire body of federal corporate law out of whole cloth.

*Id.* at 479-480.

By contrast, *In re G & L Packing Co., Inc.*, 41 *B.R.* 903 (N.D. N.Y. 1984) ("G&L"), involved a federal claim against a third party to enforce the policy and language behind the Packers and Stockyards Act. This Act created a trust on livestock and related proceeds purchased by a packer for the benefit of unpaid cash sellers to disregard the formation of two separate entities on paper that were really a single integrated entity.[5]

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5. In *G&L*, defendant Marine argued numerous formal indicia proved the separate nature of Orange and G & L. It emphasizes that G & L and Orange are separately incorporated and share no common officers, directors or shareholders; that the firms are located in different cities and perform different commercial functions; that the two firms retained separate attorneys; that G & L had an accountant while Orange did not. The court held these factors are not incompatible with a finding that G & L and Orange are a single integrated enterprise. Orange was set up specifically to expand G & L's operations into the slaughtering field; its location in Dewitt was due to the fortuitous availability of facilities there. The ownership and control of the two entities were separate in name only: Franklin Giruzzi was the dominant presence in the operation of both.

The District Court distinguished *Burks* and relied heavily upon *First National City Bank v. Banco Para El Comercio*, 462 *U.S.* 611, 103 *S.Ct.* 2591, 77 *L.Ed.2d* 46 (1983). The *G & L* court noted that the statute was remedial in nature, and is designed to be construed liberally to protect unpaid suppliers of livestock from economic ruin. Thus, the *G & L* court deemed there was substantial federal interest in supplying a federal rule of decision as to whether this statute may be avoided by use of the corporate form. *Id.* at 910.

In so holding, this Court distinguished *Burks* when stating:

> However, ***a distinction must be made between state laws governing the internal affairs of corporations, and state laws defining the integrity of the corporate form itself.*** In the recently decided case *First National City Bank v. Banco Para El Comercio*, 462 *U.S.* 611, 103 *S.Ct.* 2591, 77 *L.Ed.2d* 46 (1983) a Cuban bank contended that the law of Cuba should apply in determining whether it is an instrumentality of the government, and thereby entitled to invoke sovereign immunity, or whether it is an independent corporation, and thereby subject to the claims of an American Bank. The Supreme Court declined to apply Cuban law, explaining:
>
> > As a general matter, the law of the state of incorporation normally determines issues relating to the

> ***internal affairs of a corporation.*** Application of that body of law achieves the need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation. *See Restatement (Second) of Conflict of Laws* § 302, Comments a & e (1971). *Cf. Cort u Ash*, 422 *U.S.* 66, 84, 95 *S.Ct.* 2080, 2090, 45 *L.Ed.*2d 26 (1975). ***Different conflicts principles apply, however, where the rights of third parties external to the corporation are at issue.*** See *Restatement (Second) of Conflicts of Laws, supra* § 301. ***To give conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts. We decline to permit such a result.***

*Id.*, 103 *S.Ct.* at 2597. Although Banco Para El Comercio involved a choice of law question in the international rather than intersystem (state-federal) context, the principle articulated is applicable in either case. Indeed, in a footnote to the passage quoted above, the Court cited *Anderson v. Abbott*, 321 *U.S.* 349,

> 64 *S.Ct.* 531, 88 *L.Ed.* 793 (1944) for the analogous proposition that ***'no State may endow its corporate creatures with the power to place themselves above the Congress of the United States and defeat the federal policy concerning national banks which Congress has announced."*** Id. at 2597 n. 10.

*Id.* at 910 (emphasis added).

Similarly, ICTA is remedial in nature, and is designed to be construed liberally to protect unpaid freight transportation companies from economic ruin. Here, Congressional policy is to encourage sound economic conditions in transportation, including sound economic conditions among carriers. Unsound economic conditions in freight transportation would result if freight charges could not be recovered, under state successor liability law, when the predecessor's assets were voluntarily or involuntarily transferred to another corporation. Application of the minority view of successor liability under Maine law, would endow McCrum to place itself above Congress and defeat the federal policy concerning interstate commerce that Congress has announced, *i.e.*, sound economic conditions among carriers. Application of federal common law would, on the other hand, serve the purpose intended by Congress.

Thus, there is a substantial federal interest in applying federal common law for corporate successor liability in matters where the claims are governed exclusively by ICTA. As stated below, it is identical to

the law followed by a majority of states, including New Jersey. *Cf. Louisiana Pacific Corp. v. Asarco*, 909 *F.2d* 1260, 1263 (9th Cir. 1990) *with* the New Jersey Appellate Division decision in the matter *sub judice*. *Infra* at 15a-16a.

### C. Federal Common Law Provides That A Successor Company Is Liable For The Debts Of Its Predecessor Where There Exists Sufficient Indicia Of Continuity Between The Two Companies And That The Successor Firm Had Notice Of Its Predecessor's Liability

In *Glass v. Crimmins*, 299 *F. Supp. 2d.* 878 (C.D. Ill. 2004), a Carmack claim was asserted against an alleged successor corporation.

Under these circumstances the Court applied federal common law and held:

> To hold a successor liable we must find that there exists sufficient indicia of continuity between the two companies and that the successor firm had notice of its predecessor's liability.

*Id.* At 889.

To prove a "continuous relationship", other courts have noted that the various factors should be considered, including but not limited to:

> (1) substantial continuity of the same business operations;

(2) use of the same plant;

(3) continuity of work force;

(4) similarity of jobs and working conditions;

(5) similarity of supervisory personnel;

(6) similarity in machinery, equipment, and production methods;

(7) similarity of products and services; and

(8) the ability of the predecessor to provide relief.

*See e.g. Cobb v. Contract Transport, Inc.* 452 *F.3d* 543,551 (6th Cir. 2006) and cases cited therein.

Moreover, other courts have applied federal common law when deciding whether a corporate successor was liable on a federal claim. *Id.* (applying federal common law on successor liability for claims under the Family Medical Leave Act 29 *U.SC.* § 2601-2654); *McKee v. American Transfer and Storage*, 946 *F. Supp.* 485 (N.D. Tex. 1996) (claims under Title VII and the American with Disabilities Act, 42 *U.S.C.* 12101 *et seq.*); *Louisiana Pacific Corp. v. Asarco*, 909 *F.2d* 1260 (9th Cir. 1990) (claims under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) 42 *U.S.C.* § 9607, 9613).

The federal common law on successor liability should apply for freight charge claims because it furthers the federal Congressional policy, see *Cobb*, 452 *F.3d* at 551-552, as embodied in ICTA. For reasons stated in Point I, *supra*. Alliance's claim arises under federal statutory law that regulate the interstate shipment of goods. These statutes and regulations promulgated thereunder were enacted to provide certainty and sound economic conditions among freight transportation companies.

Interstate commerce is essential to our nation's economy. Carriers can only be "economically sound" if they know they will paid for interstate transportation of goods and that such claims will not be defeated by a state common law. Therefore, federal common law, as to corporate successor liability, should have been applied herein below.

Accordingly, this Court should grant Alliance's petition for certiorari because federal common law for successor liability should be used for a federal claim for freight charges. The freight transportation industry needs uniformity when shippers (or consignees), which are liable for freight charges under federal law, voluntarily or involuntarily sell their assets. The federal policy of uniform law in the federally regulated industry of interstate freight transportation is essential to ensure a strong national economy. This policy should be advanced to provide a framework of economic certainty as Congress stated to be its purpose when enacting ICTA.

## CONCLUSION

The petition for certiorari should be granted to resolve significant questions arising from the New Jersey Superior Court decisions in conflict and inconsistent with the relevant decisions of this Court and Congressional intent. Absent certification, application of state corporate successor liability law will be allowed to stand and strip federal statutory rights. Paramount importance of Congress' vision is that the transportation policy in the United States encourages sound economic conditions. This mandates that this Court grant certiorari to resolve the questions of whether freight transportation claims arise under federal law, and whether federal common law, as to successor liability, should be applied on such claims. Granting certiorari will dispositively deal with these issues. *S. Ct. R.* 10( c).

Respectfully submitted,

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**APPENDIX A — DECISION OF THE NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION, IN THE MATTER ENTITLED *ALLIANCE SHIPPERS, INC. v. PENOBSCOT FROZEN FOODS, INC., ET AL.*, DOCKET NO.: A-4441-06T5 DATED MARCH 4, 2009**

**SUPERIOR COURT OF NEW JERSEY**
**APPELLATE DIVISION**
**DOCKET NO. A-4441-06T5**

ALLIANCE SHIPPERS, INC.,

Plaintiff-Respondent/
Cross-Appellant,

v.

PENOBSCOT FROZEN FOODS, INC., FREDERICK D. STARRETT, III, individually and as an agent of PENOBSCOTT FROZEN FOODS, INC. AMERICOLD LOGISTICS, L.L.C., ASSOCIATED GROCERS, INC., ASSOCIATED WHOLESALE GROCERS, INC., BRUNO'S SUPERMARKETS, INC., CHENEY BROTHERS, INC., GORDON FOOD PRODUCTS CORP., MCLANE COMPANY, INC., PIGGLY-WIGGLY CO. AND WINN-DIXIE STORES, INC.,

Defendants,

and

*Appendix A*

PENOBSCOT MCCRUM, L.L.C.,
COUNTY SUPER SPUDS, INC.,

Defendants-Appellants/
Cross-Respondents.

Argued February 2, 2009 – Decided March 4, 2009

Before Judges Lisa, Reisner and Alvarez.

PER CURIAM.

This appeal involves a commercial dispute between Penobscot McCrum, L.L.C. (McCrum), which bought the assets of Penobscot Frozen Foods, Inc. (Penobscot) at a foreclosure sale, and Alliance Shippers, Inc. (Alliance), the intermodal shipping company that transported Penobscot's and McCrum's products. McCrum appeals from trial court orders dated November 1, 2006, February 16, 2007 and April 3, 2007. Alliance cross-appeals from the November 1, 2006 and April 3, 2007 orders.

In brief summary, McCrum contends that the trial court erred in awarding Alliance approximately $43,000 in damages based on quantum meruit. McCrum also contends the court should not have stricken its offer of judgment. In its cross-appeal, Alliance, invoking claims of successor liability and fraudulent transfer, contends that McCrum was entirely liable for Penobscot's debts to Alliance totaling over $200,000. Alliance argues that the trial court should have applied New Jersey law

rather than Maine law, and that regardless of which state's law applies, it is at least entitled to additional damages for unjust enrichment. We reject the parties' contentions on the appeal and the cross-appeal and affirm.

I

This case involves a Maine-based business, Penobscot, that obtained a business loan in Maine from a Maine bank, Key Corporate Capital, Inc. (Key). After Penobscot defaulted on the loan, Key foreclosed on Penobscot's assets which had been pledged as security for the loan. Although McCrum and Key had had some previous discussions about McCrum purchasing the Penobscot business, Key eventually had the assets sold at public auction. In connection with the foreclosure, Key arranged with Tranzon Auction Properties, an independent professional auctioneering firm with offices in Portland, Maine, to sell the collateral, at auctions held in Belfast, Maine and Washburn, Maine. McCrum produced an affidavit from Key's attorney, who had handled the foreclosure and arranged for the auction sale, attesting that "[t]he foreclosure sale was done at arm's length" and that "Key Corporate's sole objective was to maximize the value of the Key Collateral in order to satisfy Penobscot's obligations" under the defaulted loan.

McCrum also produced legally competent, undisputed evidence that Tranzon was an independent auction firm having no affiliation with Key, McCrum or

Alliance. Although Tranzon widely advertised the auctions and responded to inquiries from fifteen potential buyers, only two bidders participated in the auction at Washburn and one bidder participated in the Belfast auction. McCrum was the successful bidder at both auctions,[1] paying a total of $1.8 million. Under Maine law, a bona fide arms-length purchaser of corporate assets is not liable for the debts of the purchased corporation.

After the foreclosure sale, McCrum essentially continued the potato-processing business, using the same facilities and the same employees as Penobscot. Because McCrum purchased Penobscot's receivables, among other assets, it had the right to collect from Penobscot's customers for products delivered before as well as after the foreclosure sale.

Alliance is a New Jersey-based shipping company which had pre-existing contracts with Penobscot to transport its potato products all over the country. Before the foreclosure action was filed, while the foreclosure was proceeding, and after McCrum bought the assets, Alliance was providing shipping services, transporting the potato products to various locations throughout the United States. McCrum bought Penobscot's assets at auction on April 29, 2004, but did not give Alliance contemporaneous notice of the purchase. Meanwhile, Alliance was transporting potato products produced at

1. A company called Super Spuds had the right to bid, but assigned its right to McCrum, which actually completed the purchase. We will refer to the purchaser as McCrum.

the Penobscot factory now owned by McCrum and for which McCrum would eventually bill Penobscot's customers.

It is undisputed that Penobscot did not require its customers to pay directly for shipping services but rather built those transportation costs into its own bills to the customers. Moreover, as a condition of its contract with Penobscot, Alliance was required to provide Penobscot with invoices for its services and bills of lading signed by the customers. Those documents were due when Alliance's deliveries were complete, and they were then used to create Penobscot's bills to its customers. While each Alliance pick-up of potato products from the factory generally resulted in several "stops" or deliveries to customers throughout the country, Alliance would not get paid for any of its services until it provided one invoice for all the deliveries resulting from that pick-up, plus a bill of lading for each separate delivery.

McCrum continued the practice, billing the customers for products delivered by Alliance and including at least some portion of the charges for Alliance's services in those bills. However, while Alliance produced McCrum's bills at the trial, Alliance did not produce proof as to how much McCrum actually charged its customers for transportation, which was not itemized separately on the bills.

When McCrum refused to pay all of Alliance's outstanding bills to Penobscot for transportation

services, totaling approximately $250,000, Alliance sued McCrum, as well as other parties, to collect the debt.[2] Judge Waugh, then the Presiding Judge of Chancery, General Equity, held that Maine law applied to Alliance's lawsuit.

In an oral opinion placed on the record on August 4, 2006, Judge Waugh reasoned that under the governmental interest test set forth in *Veazey v. Doremus*, 103 *N.J.* 244, 247-48 (1986), and *Fu v. Fu*, 160 *N.J.* 108, 118 (1999), Maine had a greater interest than New Jersey had in applying its law of successor liability to the Maine foreclosure sale. He reasoned that accepting Alliance's position would mean that "arising out of the same [foreclosure] sale transaction you could have many different results depending upon whether you apply the law of one state . . . or another. If you consistently apply the law of the state where [the sale] took place . . . at least it's going to be a uniform application of law ." In a later opinion placed on the record on October 6, 2006, the judge also noted: "The only contact with New Jersey is that Alliance happens to be located in New Jersey. This is not a . . . transaction that . . . took place in New Jersey."

Further, in the October 6 opinion, Judge Waugh noted the parties' apparent agreement that Alliance was entitled to payment for "any transactions that began after the sale of . . . Penobscot's assets at a foreclosure

2. Alliance eventually collected approximately $45,000 in settlements with several other parties.

sale that took place on April 29, 2004 . . . and . . . any shipments that were in transit at the time of the sale on April 29, 2004." In an order dated November 1, 2006, the judge granted summary judgment to Alliance "on the contract claims relating to shipments in transit at the time of the April, 2004 auction sale and for shipments originating after the April 29, 2004 auction sale."

The judge then addressed "the shipments that were complete as of the date of the sale on April 29, 2004."[3] With respect to those shipments, he held that Alliance was entitled to collect from McCrum, under a theory of unjust enrichment, the lesser of the amounts Alliance charged Penobscot for transporting those shipments or the amount McCrum actually billed its customers for the transportation. The basis for the limit on the amount to be recovered was evidence that Penobscot did not necessarily charge its customers the exact amount Alliance charged Penobscot for delivery, but frequently imposed a smaller charge.

In the same opinion, Judge Waugh also granted summary judgment dismissing Alliance's fraud claims,

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3. These "shipments" related to any Alliance deliveries which formed the basis of uncollected Penobscot receivables, which McCrum bought as part of the foreclosure sale. Alliance claimed that all of those receivables included a transportation charge to the customers, and that to the extent that McCrum collected monies attributable to Alliance's transportation services, whenever those services were rendered, without paying Alliance for the services, McCrum would be unjustly enriched.

concluding that there was no proof that the foreclosure sale was anything but a bona fide arm's length transaction:

> [I]t's clear to me that although there were discussions between the bank and the new Penobscot purchasers, that this was a sale that cannot be described as collusive. The . . . sale was duly advertised and an auction took place, or a bidding procedure took place. There was only one active bidder, and that was the parties that I referred to as new Penobscot [McCrum]. There is no suggestion . . . in the record, that anything took place that deterred or discouraged any other potential bidder from appearing at the sale and bidding a higher price.
>
> Under Maine law, that really is the issue for a secured party foreclosure sale for fraudulent transfer. So, I will grant summary judgment to the defendants on that issue . . . .

In response to Alliance's argument that discussions between McCrum and Key bank had resulted in Key setting an undisclosed "reserve" bidding price for the sale, the judge concluded that even if there was such a reserve, it made no difference to the outcome:

> [E]ven if there was a reserve that was not disclosed, I don't see how that infected the sale in any way. . . . [I]f there had been a

> reserve [and] people were told, don't bother showing up unless you're going to bid $1 million, and then at the sale the bank had said, well, nobody has bid $1 million but new Penobscot [McCrum] here has bid [$]900,000 so we're going to waive our reserve and take [$]900,000, that would have been a problem, because clearly . . . other bidders were discouraged to come and bid less than $1 million, but I don't see anything about this transaction that's been put into the record . . . that indicates to me that any . . . bona fide bidders were in any way discouraged or prevented from coming to this auction and . . . making a bid that would have produced more money.

In an oral opinion placed on the record on February 16, 2007, the judge granted a motion striking McCrum's $25,000 offer of judgment, relying on *City of Cape May v. Coldren*, 329 *N.J.Super.* 1 (App.Div.2000). The remaining claims then proceeded to a bench trial before Judge Mathias Rodriguez.

At the bench trial, Louis Trentacoste, Alliance's Vice President of Logistics and Distribution, testified that as a condition of getting paid for its transportation services, Alliance was required to provide Penobscot with bills of lading and proof of deliveries (POD).[4] These

4. This testimony is consistent with a copy of the contract between Penobscot and Alliance, presented to Judge Waugh as part of the summary judgment motions. The contract required Alliance to provide Penobscot with bills of lading.

documents would "show that the product, all of the product was received and in good condition by the people who Penobscot wanted it delivered to." Otherwise "if the bill of lading and COD [sic] is not part of it, then there's always the possibility that Penobscot's purchaser won't want to pay them and say that they didn't receive anything." He also confirmed that without these documents, the shipper, in this case Penobscot, "may not get paid because it needs to have proof that . . . what they sold was delivered to the customer." McCrum did not present evidence to contradict that testimony, although it claimed that for accounting purposes it considered a sale complete when the goods were loaded on Alliance's trucks.

In support of its claim, Alliance produced P-2, a computer-generated report of its accounts receivable billed to Penobscot. The list appeared to indicate that between April 30, 2004 and May 14, 2004, Alliance billed $52,665.90, representing twenty invoices, of which McCrum paid $8699.25. This document did not indicate when the goods were actually picked up and delivered. However, in later testimony, Trentacoste confirmed that Alliance transported approximately twenty shipments on and after April 29, 2004. He also confirmed that those shipments represented the last twenty invoices reflected on the P-2 list of receivables. He testified that Alliance was still owed $43,952.65 for those shipments.

According to Trentacoste, McCrum did not notify Alliance of the auction sale until May 12, 2004. However, in telephone conversations, Alliance was "told that the

business was going to be changing hands and. . . all of our business was going to remain as is." Based on that conversation, Alliance continued to provide its services. According to Trentacoste, frequently those services would include several stops in the course of one shipment, but Alliance was not entitled to submit an invoice or receive payment until all the stops were accomplished.

In his testimony, Gordon Pow, a corporate officer of McCrum, agreed that the carrier "is not entitled to payment until they provide proof of delivery." He also agreed that at least ten of the invoices listed on P-2 referred to "one or more stops [that] occurred on and after 4/29/04." He conceded that after the auction, McCrum never notified Alliance to "stop making . . . deliveries of shipments that it had picked up on or before the auction date."

Following the trial, Judge Rodriguez issued a written opinion dated February 26, 2007, concluding that Alliance was entitled to approximately $43,000 in damages for quantum meruit, including charges for shipments as to which the only remaining service Alliance rendered to McCrum was providing its invoices and bills of lading signed by the customers. He found that without the latter, McCrum could not bill McCrum's (formerly Penobscot's) customers. However, Judge Rodriguez also held that Alliance was not entitled to its claim for approximately $73,000 in additional unjust enrichment damages based on McCrum's pass-through to its customers of transportation charges, because

Alliance failed to prove the amounts McCrum actually charged the customers for transportation costs.[5]

II

This appeal followed, with Alliance claiming it was entitled to approximately $73,000 in additional damages, and McCrum asserting that Alliance was entitled to nothing, apart from approximately $9,000 in service charges for which McCrum already paid. McCrum also claimed that Alliance should pay McCrum's counsel fees under the offer of judgment rule.

Our review of the trial court's summary judgment rulings is de novo, as is our review of the court's decisions on legal issues generally. *Prudential Prop. & Cas. Ins. Co. v. Boylan*, 307 *N.J.Super.* 162, 167 (App.Div.), *certif. denied*, 154 *N.J.* 608 (1998); *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 *N.J.* 366, 378 (1995); *Mastondrea v. Occidental Hotels Mgmt.*, 391 *N.J.Super.* 261, 283 (App.Div.2007). However, we defer to Judge Rodriguez's factual findings

5. Judge Rodriguez's written opinion reflected an oral opinion which he placed on the record on February 20, 2007, dismissing Alliance's unjust enrichment claim at the close of plaintiff's case. After conferring with Judge Waugh to be sure there was no confusion as to the terms on which Judge Waugh had permitted Alliance's unjust enrichment claim to proceed to trial, Judge Rodriguez concluded that Alliance had the burden of proving the unjust enrichment claim and that its evidence on the pass-through of transportation costs, even viewed in the light most favorable to Alliance, could not sustain that burden.

based on the trial record, so long as they are supported by substantial credible evidence. *Rova Farms Resort, Inc. v. Investors Ins. Co.*, 65 *N.J.* 474, 483-84 (1974).

Because we agree with Judge Rodriguez that Alliance did not prove its claim of unjust enrichment, we need not decide whether Alliance was entitled to assert that cause of action in the first place. Nor do we address McCrum's $25,000 offer of judgment, because our affirmance of Alliance's $43,000 judgment renders that issue moot. Having canvassed the voluminous record, we find no merit in either party's remaining arguments.

We begin with the choice-of-law issue. Our courts apply a governmental interest test in deciding conflict-of-law issues:

> Traditionally, the place of contract governs the choice of law unless another jurisdiction has a more significant relationship with the parties and/or transaction. *State Farm Mutual Auto. Ins. Co. v. Estate of Simmons*, 84 *N.J.* 28, 37 (1980). "This rule is to be applied unless the dominant and significant relationship of another state to the parties and the underlying issue dictates that this basic rule should yield." *Ibid.* However, our Supreme Court has endorsed a flexible "governmental interest" analysis to determine which state has the greatest interest in governing the specific issue that arises in the

> underlying litigation. *Erny v. Estate of Merola*, 171 *N.J.* 86, 94 (2002); *Lonza, Inc. v. The Hartford Accident and Indem. Co.*, 359 *N.J.Super.* 333, 345 (App.Div.2003). "Ordinarily, choice-of-law determinations are made on an issue-by-issue basis, with each issue receiving separate analysis." *Erny, supra*, 171 *N.J.* at 94. Under the governmental interest analysis, the court is required to determine: (1) whether there is an actual conflict between the laws of the states involved; (2) the policy interest that each state has in applying its law to the particular circumstances and parties; and (3) how strongly the contacts involved relate to each state's policy and whether application of one law will further or frustrate the policies of the other state.
>
> [*Walsh v. Mattera*, 379 *N.J.Super.* 548, 555 (App. Div. 2005).]

In applying the governmental interest test, New Jersey follows the *Restatement* in considering the following factors:

> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied

[*Fu v. Fu*, 160 *N.J.* 108, 122 (1999) (quoting *Restatement (Second) of Conflict of Laws* § 6 (1971).]

There is a conflict between the laws of New Jersey and Maine respecting the issue of successor liability. In New Jersey, the law can be summarized as follows:

> [W]here one company sells or otherwise transfers all of its assets to another company the latter is not liable for the debts and liabilities of the transferor, including those arising out of the latter's tortious conduct, except where (1) the purchaser expressly or impliedly agrees to assume such debts and liabilities; (2) the transaction amounts to a consolidation or merger of the seller and

> purchaser; (3) the purchasing corporation is merely a continuance of the selling corporation, or (4) the transaction is entered into fraudulently in order to escape liability for such debts.
>
> [*Jackson v. N.J. Mfrs. Ins. Co.*, 166 *N.J.Super.* 448, 454 (App.Div.), *certif. denied*, 81 *N.J.* 330 (1979).]

In Maine, the inquiry is simpler and generally protects the successor corporation from liability for the debts of its predecessor:

> [A]bsent a contrary agreement by the parties, or an explicit statutory provision in derogation of the established common law rule, a corporation that purchases the assets of another corporation in a *bona fide*, arm's-length transaction is not liable for the debts or liabilities of the transferor corporation.
>
> [*Dir. of Bureau of Labor Stds. v. Diamond Brands, Inc.*, 588 *A.*2d 734, 736 (Me.1991).]

We agree with Judge Waugh that the analysis must properly focus on the foreclosure sale and not on the contract between Alliance and Penobscot. The foreclosure sale took place in Maine, and that state clearly has a strong interest in governing the legal results of the sale. Maine law appears aimed at creating certainty and thus facilitating the sales of businesses.

Those policies are implicated here. Unless Maine law applies to foreclosure sales in Maine, creditors would have considerable difficulty selling their corporate debtors' assets, because prospective purchasers would have no certainty as to whether they might be charged with the debtor corporations' liabilities. As Judge Waugh observed, unless Maine law applies to the foreclosure sale, a purchaser might be subject to the successor-liability laws of fifty different states, depending on the locations of the foreclosed company's creditors.

Since both Maine and New Jersey have adopted versions of the Uniform Fraudulent Transfer Act, *N.J.S.A.* 25:2-20 to -34 and *Me.Rev.Stat. Ann.* tit. 14, § 3571-3582, application of Maine law does not leave out-of-state creditors without a remedy against fraud. Further, as Judge Waugh correctly noted, other than the fact that Alliance has its principal offices in New Jersey, this State has virtually no contacts with the case. Both Penobscot and McCrum are Maine corporations, the lender was based in Maine, the foreclosure sale was in Maine, and Alliance picked up the goods in Maine and delivered them all over the country. Finally, if any wrong was done in this case, it was committed in Maine, where Alliance alleges McCrum and Key conspired to defraud Penobscot's creditors. We find no basis to apply New Jersey law to this case. *See Fu, supra*, 160 *N.J.* at 122.

Alliance's fraud or "collusive sale" argument is likewise without merit and warrants no discussion, beyond the following comments. *R.* 2:11-3(e)(1)(E).

McCrum and Key had discussions before the foreclosure sale concerning McCrum's possible purchase of Penobscot's assets. However, they were unable to finalize an agreement of sale and therefore Key had the debtor's assets sold at a foreclosure auction. The undisputed evidence is that the sale, conducted by Tranzon, an independent company, was the result of a bona fide auction which was widely advertised. *See Donaghy v. Leighton*, 351 *A.*2d 125, 128 (Me.1976). Even if McCrum and Key had prior discussions, there is no evidence that any other potential purchaser was deterred from bidding or that the price was artificially inflated or depressed. There is no evidence that Key was motivated to do anything other than maximize its recovery of the amounts Penobscot owed. And there is no evidence of collusion, i.e., a "secret agreement . . . to deceive and defraud" Penobscot's creditors or other potential bidders. *Mercier v. John Hancock Mut. Life Ins. Co.*, 44 *A.*2d 372, 376 (Me.1945).[6]

We agree with Judge Rodriguez that Alliance failed to prove its case of unjust enrichment. Alliance claimed that McCrum was unjustly enriched by charging its customers for transportation services for which McCrum had not paid Alliance. In support of that claim, Alliance presented proof of its invoices to Penobscot and McCrum, and proof that McCrum billed its customers

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6. *Cook v. Cook*, 574 *A.*2d 1353, 1354-55 (Me.1990), which Alliance cites, is not on point. That case involved a collusive foreclosure between a divorcing husband and his mother in an effort to keep property away from his wife.

for the products, but Alliance did not present evidence as to the amounts McCrum charged the customers for Alliance's transportation services. Alliance's witness, Kathleen Kertesz, admitted she had no knowledge "as to what freight charges . . . Penobscot [McCrum] would have collected on those invoices." Assuming for the sake of argument that its unjust enrichment theory was viable, Alliance still had the burden to prove its damage claim; it failed to carry its burden. *See Kutzin v. Pirnie*, 124 *N.J.* 500, 516-17 (1991). No further discussion of this issue is warranted. *R.* 2:11-3(e)(1)(E).

Finally, we turn to the issue of quantum meruit. " *Quasi*-contractual obligations are imposed by law to bring about justice, without reference to the parties' intent. *Quantum meruit* is a form of quasi-contract, permitting recovery of as much as is deserved." *Glick v. Barclays De Zoete Wedd, Inc.*, 300 *N .J.Super.* 299, 310 (App.Div.1997) (citation omitted). These obligations " 'rest on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another, and on the principle that whatsoever it is certain that a man ought to do, that the law supposes him to have promised to do.' " *St. Paul Fire & Marine Ins. Co. v. Indemnity Ins. Co.*, 32 *N.J.* 17, 22 (1960) (quoting 17 *C.J.S. Contracts* § 6, at 324). The test for entitlement is as follows:

> To recover under a theory of *quantum meruit*, a plaintiff must establish: "(1) the performance of services in good faith, (2) the acceptance of the services by the person to

> whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services." *Longo v. Shore & Reich, Ltd.*, 25 *F.*3d 94, 98 (2d Cir.1994)
>
> *Starkey, Kelly, Blaney & White v. Estate of Nicolaysen*, 172 *N.J.* 60, 68 (2002).]

In this case, Alliance's claim in quantum meruit was based on the facts that it performed services under the Penobscot contract after the foreclosure sale, that McCrum accepted and benefited from those services, and that Alliance performed the services expecting compensation even though it performed some of the services before it learned about the foreclosure sale.

In opposing the claim, McCrum relies on a series of cases that are not on point. In *Callano v. Oakwood Park Homes Corp.*, 91 *N.J.Super.* 105 (App. Div. 1966), we found no basis to invoke quantum meruit where a landscaping company sold shrubs to the contract purchaser of a house. When the purchaser passed away and his estate decided not to buy the house, the landscaper tried to collect the price of the planted shrubs from the homebuilder on a quantum meruit theory. We described quantum meruit as follows:

> *Quasi*-contractual liability has found application in a myriad of situations. However, a common thread runs throughout its application where liability has been

> successfully asserted, namely, that the plaintiff expected remuneration from the defendant, or if the true facts were known to plaintiff, he would have expected remuneration from defendant, at the time the benefit was conferred. It is further noted that *quasi*-contract cases involve either some direct relationship between the parties or a mistake on the part of the person conferring the benefit.
>
> [*Id.* at 109 (citations omitted).]

We concluded that the landscaper sold and delivered the plants to the contract purchaser, made no mistake as to identity of the person to whom the goods were being delivered, and only had a reasonable expectation of payment from that purchaser.

In this case, by contrast, Alliance provided services to McCrum, not initially realizing that Penobscot's business had been sold at auction. Alliance expected to be paid and in fact ceased providing services as soon as McCrum announced that it would not pay for services rendered under the Penobscot contract. Nor is *Kagen v. K-Tel Entertainment, Inc.*, 172 *A.D.*2d 375 (N.Y. App. Div. 1991) on point; in that case, as in *Callano*, the plaintiff sought to recover for past services to another party, rather than services rendered to the defendant.

*Moser v. Milner Hotels, Inc.*, 6 *N.J.* 278 (1951), is likewise inapplicable here. The parties there had a

written contract setting a price for the plaintiff to paint hotel rooms; the plaintiff tried to charge a higher price and the court held him to the terms of the contract. In this case, while Alliance had a contract with Penobscot, it had no contract with McCrum. However, between the time of the foreclosure sale in April, and several weeks later in May, it was transporting goods belonging to McCrum and otherwise providing services to McCrum. We find no merit in McCrum's argument that it does not owe Alliance for these services in quantum meruit.

Finally, we address the issue of the types of services for which Alliance is entitled to payment. McCrum contends that even under Judge Waugh's ruling, Alliance is only entitled to payment for goods that were *both* picked up and delivered after April 29, 2004. In fact, McCrum contends that it paid Alliance approximately $9000 for those services; Alliance agrees with that figure. However, Alliance contends that it is also entitled to payment for goods picked up before April 29 but delivered after that date, because after April 29 the goods belonged to McCrum and therefore Alliance was actually performing a service to McCrum. Alliance further contends that it is entitled to payment for deliveries made prior to April 29 but for which Alliance had not yet delivered invoices and bills of lading to Penobscot. Alliance claims that delivery of the invoice and bill of lading was the third and necessary part of its work because McCrum could not bill its own customers without proof of transportation and delivery from Alliance. Judge Rodriguez accepted Alliance's argument as to both claims, and awarded Alliance approximately $43,000.

We agree that delivery was an integral part of the service rendered to McCrum, for which Alliance was entitled to payment. McCrum's customers certainly would not have paid McCrum for goods picked up from the factory by Alliance but never delivered to the customers. Under the facts of this case, as found by Judge Rodriguez and as supported by the trial testimony, McCrum also could not bill its customers or collect its charges without the bills of lading, which proved that the correct goods were delivered in undamaged condition. We find no error in the trial court's equitable determination to permit Alliance to recover from McCrum for all of those services which it provided to McCrum after the auction sale.

Affirmed.

**APPENDIX B — ORDER DATED NOVEMBER 1, 2006 BY THE HON. ALEXANDER P. WAUGH, JR., JUDGE, N.J. SUPERIOR COURT, LAW DIVISION (MIDDLESEX COUNTY) WHICH, IN PERTINENT PART, GRANTED DEFENDANTS, PENOBSCOT McCRUM, LLC AND COUNTY SUPER SPUDS, INC.'S MOTION DISMISSING PLAINTIFF'S CLAIMS ON SUCCESSOR LIABILITY AND FRAUDULENT TRANSFERS IN THE MATTER ENTITLED *ALLIANCE SHIPPERS, INC. v. PENOBSCOT FROZEN FOODS, INC., et al.*, DOCKET NO. MID-L-4374-04**

**SUPERIOR COURT OF NEW JERSEY**
**LAW DIVISION: MIDDLESEX COUNTY**
DOCKET NO.: L-4374-04

CIVIL ACTION

ALLIANCE SHIPPERS, INC.,

Plaintiff(s),

vs.

PENOBSCOT FROZEN FOODS, INC.; COUNTY SUPER SPUDS, INC.; PENOBSCOT McCRUM, LLC; FREDERICK D. STARRETT, III, individually and as an agent of PENOBSCOT FROZEN FOODS, INC.; PENOBSCOT McCRUM, LLC and CHENEY BROTHERS, INC.;

Defendant(s).

*Appendix B*

THIS MATTER having been opened to the Court by Scarinci, Hollenbeck, LLC, attorneys for Defendants, Penobscot McCrum, LLC and County Super Spuds, Inc., upon an application for summary judgment, and by Ronald Horowitz, Esq., attorney for Plaintiff, Alliance Shippers, Inc., upon a cross motion for summary judgment, the Court having considered the moving, opposing, reply and supplemental papers, having conducted oral argument on August 4, 2006 and October 6, 2006, and for the reasons stated on the record on August 4, 2006, including issues related to choice of applicable law, October 6, 2006 and further good cause shown;

IT IS ON THIS 1st day of November, 2006:

ORDERED that partial summary judgment be and hereby is granted in favor of the Plaintiff, Alliance Shippers, Inc., and against Defendant, Penobscot McCrum, LLC, on the claim of unjust enrichment relating to invoices of Penobscot Frozen Foods, Inc. to its customers that were paid to Defendant, Penobscot McCrum, LLC for the lessor of Alliance's charge for shipping or the shipping charge built into the price charged to the purchases;

IT IS FURTHER ORDERED that partial summary judgment be and hereby is granted in favor of Plaintiff, Alliance Shippers, Inc., and against Defendant, Penobscot McCrum, LLC, on the contract claims relating to shipments in transit at the time of the April 29, 2004 auction sale and for shipments originating after the April 29, 2004 auction sale;

IT IS FURTHER ORDERED that unless the parties agree to the amount of damages relative to the partial summary judgment granted in the preceding ordering paragraphs, the Court shall conduct a hearing on damages;

IT IS FURTHER ORDERED that partial summary judgment be and hereby is granted to Defendants, Penobscot McCrum, LLC and County Super Spuds, Inc., on the claims of successorship liability and fraudulent transfers;

IT IS FURTHER ORDERED that all claims against Defendant, County Super Spuds, Inc., be and hereby are dismissed with prejudice;

IT IS FURTHER ORDERED that the next case management conference date shall be on December 5, 2006 at 9:00 P.M.;

AND IT IS FURTHER ORDERED that a copy of this Order be served on all counsel of record within seven (7) days of the date hereof.

s/ Alexander P. Waugh, Jr.
ALEXANDER P. WAUGH, JR., J.S.C.

**APPENDIX C — TRANSCRIPT OF OCTOBER 6, 2006 DECISION ON MOTION FOR SUMMARY JUDGMENT BY THE HON. ALEXANDER P. WAUGH, JR., JUDGE, N.J. SUPERIOR COURT, LAW DIVISION (MIDDLESEX COUNTY) IN THE MATTER ENTITLED *ALLIANCE SHIPPERS, INC. v. PENOBSCOT FROZEN FOODS, INC., et al.*, DOCKET NO. MID-L-4374-04**

**SUPERIOR COURT OF NEW JERSEY**
**LAW DIVISION, CIVIL PART**
**MIDDLESEX COUNTY**
DOCKET NO.: MID-L-4374-04
A.D. NO.:

ALLIANCE SHIPPERS, INC.

Plaintiff

vs.

PENOBSCOT, ET AL

Defendants

Place: Middlesex County Courthouse
56 Paterson St.
New Brunswick, NJ 08903

Date: October 6, 2006

*Appendix C*

[Commencing at page 76]

* * *

THE COURT: Okay. On August 4th on cross-motions for summary judgment, and at that time, I — I — we had a lengthy colloquy as we have had today, and I set forth the nature of the case, and I determined that Maine law applies with respect to the issue of [77] fraudulent transfer, and Mr. Horowitz, sort of at the last minute, asked me to reconsider that.

I have considered his — his argument, but I remain of the opinion that the — the issue is — is governed by the analysis required in *Fu v. Fu* (phonetic) 160 New Jersey 108 (1999), which is the decision of the State Supreme Court where you apply the flexible government interest test and the five factors, and I believe I did that the last time, and I — I'm not persuaded that I was incorrect.

When we discussed in — in colloquy, and I incorporate by reference everything that's — that took place during the argument, because it — it reflects a great deal of my — my thinking on this. The only contact with New Jersey is that Alliance happens to be located in New Jersey. This is not a — a transaction that really took place in New Jersey, and the only contact with Maine is that the — the alleged debtor happens to be in Maine. If that were the case, I would probably decide that New Jersey law should apply to the issue of fraudulent transfer.

*Appendix C*

We also — I also asked for some further briefing and discussion of the unjust enrichment/pass-through issue. There were assets that were acquired by the defendants that are generally referred to as new [77] Penobscot, although I believe that they should properly be known as Penobscot McCrum, LLC and County Super Spuds, but I'm going to continue to call them new Penobscot even though defendants may lack — not like that, it's easier for me.

They -- they acquired some assets including receivables, and some of those receivables involved transactions that enrich Alliance was the shipper. Now, Mr. Bals has agreed that any transactions that began after the sale of old Penobscot's assets at a foreclosure sale that took place on April 29, 2004, those shipments would be the responsibility of new Penobscot, and Mr. Bals has also agreed that any shipments that were in transit at the time of the sale on April 29, 2004 would be the responsibility of new Penobscot. So, the only I — the only issues here are the tran — the shipments that were complete as of the date of the sale on April 29, 2004.

Now, with respect to some of those, although perhaps not all, new Penobscot received payment. So the issue was whether they were unjustly enriched by receiving payment that included reimbursement to old Penobscot for the shipping charges. The — the record seems to be clear that — that — could you tell the attorneys outside that I will be with them in probably [79] about 5 or 10 minutes. And they — they just need to cool their jets out there.

*Appendix C*

The testimony seems to be clear that old Penobscot charged two prices depending on whether the goods were picked up in Maine or were shipped to the purchaser, and the way it worked was that if something was going to be shipped, there was a matrix that was supplied by old Penobscot, and depending on where it was zoned or where it was going to be shipped to, a charge — what was really a shipping charge was added to the price. Unlike some businesses, it wasn't the product is X and the shipping charge is Y, old Penobscot chose to just take X — the X price, add Y, and come up with Z as the product price.

It also seems to be clear from the record that these calculations were not based on actual shipping charges, they were, I guess, estimates, and it also appears that they were probably not particularly good estimates, and that they were usually lower than the — the actual cost of shipping. So the issue then is whether new Penobscot had — has been unjustly enriched when these invoices are paid and they recover not only the price of the goods, but the added price of the shipping.

I believe that unjust enrichment is an equitable remedy and the argument was made that any unjust enrichment claim was extinguished by the sale on April 29, 2004, but that would not apply in this case because the unjust enrichment didn't take place until after the sale when the payments were received by new Penobscot.

*Appendix C*

We spent a lot of time talking in terms of passthrough, and I don't think that when we're dealing with an equitable remedy such as — as this, that a form should be exulted over substance, and I think the substance was that there was the cost of the product and then there was the shipping charge, and old Penobscot chose to not differentiate between them, but to add the shipping charge to the cost and — and that was the price. And I think that by receiving payment for those without requiring some reimbursement of costs to the shipper Alliance, there would be unjust enrichment.

Now, as I think Mr. Horowitz himself recognizes, Alliance is not entitled to receive what — what its charge was for the shipment. It is entitled to receive the difference in price between the cost of the product and the amount charged, which is the cost plus X for shipping. That is the unjust enrichment. So, I will grant partial summary judgment to Alliance on that basis.

[81] Then the remaining issue is the — the allegation that there was a fraudulent transfer. The — it — it's clear to me that although there were discussions between the bank and the new Penobscot purchasers, that this was a sale that cannot be described as collusive. The — the sale was duly advertised and an auction took place, or a bidding procedure took place. There was only one active bidder, and that was the parties that I referred to as new Penobscot. There is no suggestion, as far as I'm concerned, in the record, that anything took place that deterred or discouraged any other

potential bidder from appearing at the sale and bidding a higher price.

Under Maine law, that really is the issue for a secured party foreclosure sale for fraudulent transfer. So, I will grant summary judgment to the defendants on that issue, and I think that takes care of all the liability issues in the case, although you — you need to either sort out the damage issues as — as I have laid out the liability, or we're going to have to have a trial on that issue.

* * * *

**APPENDIX D — ORDER DATED DECEMBER 27, 2005 OF THE HON. JOSE L. LINARES IN *ALLIANCE SHIPPERS, INC. v. PENOBSCOT FROZEN FOODS, et al.*, CIVIL NO. 04-CV-3557 (JLL), REMANDING MATTER TO STATE COURT**

**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEW JERSEY**

Civil Action No. 04-CV-3557 (JLL)

ALLIANCE SHIPPERS, INC.,

Plaintiff,

v.

PENOBSCOT McCRUM, LLC, et al.

Defendants.

**LINARES**, District Judge.

This matter having come before the Court pursuant to Defendant Frederic D. Starrett's Motion to Dismiss the Second Amended Complaint [35] and the Court having considered all submissions, the case is hereby remanded to the Superior Court of New Jersey, Law Division, Middlesex County as there is no subject matter jurisdiction. For the reasons set forth on the record December 22, 2005,

**IT IS** on this 27th day of December, 2005,

*Appendix D*

**ORDERED** that Defendant Frederic D. Starrett's Motion to Dismiss [35] is GRANTED; and it is further

**ORDERED** that the entire case is dismissed for lack of subject matter jurisdiction; and it is further

**ORDERED** that the case is remanded to the Superior Court of New Jersey, Law Division, Middlesex County; and it is further

**ORDERED** that the pending motion for summary judgment [52] by Defendants Penobscot McCrum, LLC and County Super Spuds, Inc. is DENIED WITHOUT PREJUDICE as moot; and it is further

**ORDERED** that the pending motions [56], [59] and [60] are hereby DISMISSED WITHOUT PREJUDICE to be raised in state court; and it is further

**ORDERED** that the Clerk shall close their file in this matter.

DATED: December 27, 2005

s/ Jose L. Linares
Jose L. Linares
United States District Judge

**APPENDIX E — TRANSCRIPT OF DECEMBER 22, 2005 DECISION OF THE HON. JOSE L. LINARES, U.S.D.J. IN *ALLIANCE SHIPPERS, INC. v. PENOBSCOT FROZEN FOODS, et al.*, CIVIL NO. 04-CV-3557 (JLL), REMANDING MATTER TO STATE COURT**

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**
Civil No. 04-3557(JLL)

ALLIANCE SHIPPERS, INC.,

Plaintiff,

- vs -

PENOBSCOT FROZEN FOODS, INC., et al.,

Defendants.

December 22, 2005

Newark, New Jersey

**TRANSCRIPT OF PROCEEDINGS**

[2] THE COURT: This is in the matter of Alliance Shippers, Inc. versus Penobscot Frozen Foods, Inc., et al.

This matter pertains to two motions. One is a motion wherein the defendant Starrett argues that the second amended complaint should be dismissed for lack of subject matter jurisdiction and personal jurisdiction

over defendant Starrett and also alleges improper venue and a failure to state a claim.

The other motion is a motion by defendant Penobscot Mc Crum and County Super Spuds. That is a motion far summary judgment against Alliance Shippers. In that particular motion, Penobscot Mc Crum and Super Spuds claim they are not liable for the amounts owed to Alliance Shippers from Penobscot Frozen Foods, who is now in bankruptcy, based on theories of successor liability.

The procedural history of this case is as follows:

On June 11, 2004, the plaintiff filed the original complaint in the Superior Court of New Jersey Law Division Middlesex County.

Thereafter, on July 26, 2004, defendants Penobscot Mc Crum and County Super Spuds removed the case to federal court invoking federal question jurisdiction under "statutes and federal common law of the United States pertaining to interstate commerce."

On December. 28, 2004, this Court entered default [3] judgment in favor of Alliance Shippers against Penobscot Frozen Foods in the amount of $258,656.73.

Thereafter, on June 10, 2005, the plaintiff filed a second amended complaint with this Court and in that complaint they added the defendant Starrett.

*Appendix E*

Three months later on April 13, 2005, defendant Starrett filed this motion to dismiss.

On September 22, 2005, defendants Penobscot Mc Crum and County Super Spuds in turn filed their motions for summary judgment.

The operative facts of this case are as follows:

The plaintiff in this case, Alliance Shippers, is in business which provides freight transport and in this case provided freight transport to Penobscot Frozen Foods, Inc., hereinafter referred to as "Penobscot."

In September of 2004, Penobscot filed for bankruptcy. It is apparently undisputed that at the time Penobscot owed Alliance Shippers outstanding balances for past shipping services, and the amount owed is not an issue in dispute in the present case.

The facts indicate that from the mid 1980s until 2004, the defendant Starrett served as president of Penobscot. The plaintiff has alleged that while acting as president of Penobscot, Starrett intentionally misrepresented Penobscot's financial position so that [4] plaintiff would continue to provide shipping services to them.

After Penobscot filed for bankruptcy and defaulted on its loan obligation, its lender, Key Corp., foreclosed on many of Penobscot's assets and sold said assets at an auction. Defendant County Super Spuds negotiated

with Key Corp. to bid on some of the assets in an open auction. Before the auction, Spuds assigned its rights to Penobscot Mc Crum, hereinafter referred to by this Court as "Mc Crum." Mc Crum was the highest bidder at two separate auctions for the assets being sold by Key Corp.

The complaint that was originally filed by the plaintiff and which was in existence at the time of the removal by the defendants, Mc Crum and Spuds alleged essentially the same counts against all of the defendants that had been named at that time. That is, that the plaintiff rendered freight transportation services on behalf of the defendants, that there was a balance due from said defendants, and that the defendants agreed to pay the amounts due. The complaint does not state any additional facts with respect to the citizenship of the defendants or the nature of the services performed by plaintiff or the basis for the amounts owed for those services.

Defendants, Mc Crum and Spuds, in their notice for removal, stated that the basis for federal jurisdiction in [5] this case was that "this case contains claims and actions which arise under the laws of the United States, specifically the statutes and federal common law of the United States pertaining to interstate commerce." These defendants in the notice for removal do not provide any additional facts other than those that were provided by the plaintiff in the original complaint. It is against this background of facts that the Court now moves to a disposition of this motion.

*Appendix E*

First, with regard to subject matter jurisdiction, Federal Rule of Civil Procedure 12(h)(3) expressly states: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the Court shall dismiss the action." Thus, the Court has the power to inquire at any time, into the jurisdiction for all of the defendants, whether raised by the defendants or by the court. *See*, *Clark v. Paul Gray*, 306 U.S. 583 (1938); *see also*, *Trent Realty Assocs. v. First Fed. Sav. and Loan Ass'n. of Philadelphia*, 657 F.2d 29, 36 (3d Cir. 1981). In this case, the plaintiff did not seek the remand of this case to the state court after the case was removed by the defendants. The issue of lack of subject matter jurisdiction was first raised in the present motion of defendant Starrett, a defendant which was added subsequent to the time that the matter was removed to this [6] court.

In order to remove a case from state court to federal court, a plaintiff must have been able to file the case originally in federal court either because of diversity of citizenship or because there is a federal question jurisdiction. This has been chiefly held in the case of *Caterpillar, Inc. v. Williams*, 482 U.S. 286, 392 (1987). In the notice for removal, if the defendant seeks to remove the case to federal court, the defendant is required to submit "a short and plain statement of the grounds for the removal." *See*, 28 U.S.C. 1446(a). Additionally, "the defendant's right to remove is to be determined according to the plaintiff's pleading at the time of the petition of removal," and any doubts about

jurisdiction should be resolved in favor of remand." *See, Abels v. State Farm Fire & Casualty Co.*, 770 F.2d 26, 29 (3d Cir. 1985).

For a case to have been originally brought in federal court based on federal question jurisdiction under section 1331, it is required that either a "federal law creates a cause of action," or that "the complaint poses a substantial federal question." *See, Virgin Islands Housing Authority v. Coastal General Construction Service Corp.*, 27 F.3d 911, 916 (3d Cir. 1994). There must be more than "the mere presence of a federal issue in the state cause of action," id. (quoting *Merrell Dow Pharmaceutical, Inc. v.* [7] *Thompson*, 478 U.S. 804, 813 (1986); for federal question jurisdiction to exist, there must be "a serious federal interest . . . thought to be inherent in a federal forum." *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 125 S.Ct. 2363, 2367 (2005).

In looking at plaintiff's pleadings at the time this case was removed, this Court notes the following:

(1) Plaintiff does not allege a violation of any federal law or even reference any federal law in his complaint. (2) Plaintiffs' allegations appear to be purely state law collection actions. (3) Plaintiff does not mention interstate commerce and merely states that the amounts owed were for freight transportation, and (4) plaintiff does not mention shipping originations or destinations, rates charged, how rates were computed or any other details about the "freight services" for which the money

was owed. Additionally,. defendant Mc Crum and Spuds in their notice for removal did not provide any additional facts indicating to this Court the basis for federal jurisdiction. All that they did was just generally make a reference to "interstate commerce."

The Court has also reviewed the plaintiff's second amended complaint, which was filed after the removal of this case. In that case the plaintiff added defendant Starrett based on a claim of misrepresentation. Plaintiff does not [8] state any basis for federal jurisdiction in that complaint or add any additional facts related to the services it provided for the defendants. Additionally, in its opposition brief to the defendant Starrett's motion to dismiss, the plaintiff appears to be guessing that the specific basis for defendants Mc Crum and Spuds' claim of federal jurisdiction was that the case involved the Interstate Termination Act, 49 U.S.C. section 10701, et seq. Aside from now agreeing that federal law governs collection of the amounts owed, plaintiff provides no additional facts about the services rendered or the basis for the amount owed. The actual amount owed is undisputed.

Plaintiff does point, however, to three cases in order to support its statement in its opposition to the defendant's motion that there is no federal jurisdiction. The plaintiff points to *Western Transp. Co. v. Wilson & Co., Inc.*, 682 F2d 1227 (7th Cir. 1982), North 1287 (7th Circuit 1982) *North Penn Transfer v. Victaulic*, 859 F. Supp. 154 (E.D. Pa. 1994), and *Oneida Motor Freight, Inc. v. Ormond Shops, Inc.*, 126 B.R. 431 (D.N.J. 1991).

The Court has carefully looked at this case. However, none of these cases in the Court's view stand for the proposition that a mere collection action which happens to arise out of "freight charges" is enough to establish a federal question jurisdiction. *Western Transp.* concerns the tariff amount [9] that a carrier is required to receive under 49 U.S.C. section 10761 and the ability to sue for undercharges, 682 F.2d at 1229. The Court notes that section 10761 is no longer in force as it was omitted in the 1995 amendment to the Interstate Commerce Act. Furthermore, that case does not deal with just collection, but rather deals with the appropriate determination of the amount due. As far as the *North Penn* and *Oneida* cases cited by the plaintiff, those cases also deal with the subsequent action to recover undercharges based on tariff rates filed for interstate commerce transportation, not a mere collection of undisputed amounts as is the case here.

In 1983, however, the Supreme Court in the *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.* held that an action for mere collection of filed rate tariffs does create federal jurisdiction. That case, however, was decided before the deregulation of the industry which occurred in 1995, and that deregulation resulted in the ICC Termination Act of 1995. *See, Matthew Bender*, 4-20 Goods in Transit section 20.03. Therefore, presently, tariffs are no longer required to be filed for rail, air and many motor carriers. *Id.* The *Thurston* decision therefore is based on the theory that because the carrier's right to collect unpaid charges depended on filed rates and the Interstate Commerce Act

requirements at the time, it held that the collection of [10] filed rate tariffs created a federal question jurisdiction. That is not the case now, and therefore that decision is distinguishable and not applicable to a case like the one presently before this Court where filed tariffs are not in any way involved. *See, Central Transp. Int'l. v. Sterling Seating, Inc.*, 356 F. Supp. 2d 786, 790 (E.D. Mich. 2005).

Having reviewed the complaints that have been filed in this matter, as well as the submissions of counsel, there is no question in this Court's mind that in the case presently before the Court there are no facts on this record that indicate that the amount incurred by the plaintiff for the freight services and which they now seek to recover from the remaining defendants based on various state law theories were "filed rate tariffs." Furthermore, no other authority has been provided by counsel to this Court asserting that under the current ICC Termination Act provisions that a mere action, such as the one before this Court, based on filed rates creates federal question jurisdiction.

Furthermore, at the time that this matter was removed to this Court, the pleadings clearly did not state a claim that was either created by federal law or that involved a substantial federal question. Furthermore, even looking beyond those pleadings, the Court finds that no federal jurisdiction exists in this case. When one looks at the details of this case, it is readily apparent that all [11] the plaintiff is asserting herein is merely a state law collection claim, as well as other purely state law claims.

*Appendix E*

As it pertains to the issue of diversity jurisdiction, diversity jurisdiction under section 1332 is available only if the citizenship of all plaintiffs is diverse from the citizenship of all defendants. *See, Strawbridge v. Curtiss*, 7 U.S. (Cranch) 267 (1806). Furthermore, a corporation is deemed to be a citizen where it is incorporated and where it has its principal place of business. 28 U.S.C. section 1332(c). Looking at the citizenship of the defendant parties in this case, it is apparent that the defendants Mc Crum and Spuds did not assert diversity jurisdiction as the basis for removal and the pleadings do not establish that complete diversity in fact existed at the time of removal. As a matter of fact, additional filings at this time do not provide any information upon which this Court could determine that complete diversity exists, nor such diversity has been asserted or established by the facts. Therefore, this Court does not have diversity jurisdiction over this case.

The Court having found that no substantial federal question exists in this case and that this case involves matters which are purely state claims, and that no diversity jurisdiction exists dismisses this action and remands this action, and it does not need to reach the merits of the [12] other claims since this Court does not have jurisdiction to adjudicate this matter.

Therefore, for all of these reasons, an order will be entered on today's date ordering that the case will be remanded to the Superior Court of New Jersey Law Division for Middlesex County.

* * * *

**APPENDIX F — ORDER OF THE NEW JERSEY SUPREME COURT IN *ALLIANCE SHIPPERS, INC. v. PENOBSCOT FROZEN FOODS, INC. et al.*, C-36 SEPTEMBER TERM 2009 63,982, DENYING ALLIANCE'S PETITION FOR CERTIFICATION DATED SEPTEMBER 11, 2009**

**SUPREME COURT OF NEW JERSEY**
C-36 September Term 2009
63,982

ALLIANCE SHIPPERS, INC.,

Plaintiff-Petitioner,

v.

PENOBSCOT FROZEN FOODS, INC., et al.,

Defendants,

and

PENOBSCOT MCCRUM, L.L.C.,
COUNTY SUPER SPUDS, INC.,

Defendants-Respondents.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-4441-06 having been submitted to this Court, and the Court having considered the same;

*Appendix F*

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Virginia A. Long, Presiding Justice, at Trenton, this 9th day of September, 2009.

s/ [illegible]
CLERK OF THE SUPREME COURT

FILED
FEB 10 2010

No. 09-674

# In The Supreme Court of the United States

ALLIANCE SHIPPERS, INC.,

*Petitioner,*

v.

PENOBSCOT FROZEN FOODS, INC., FREDERICK D. STARRETT, III, individually and as an agent of PENOBSCOT FROZEN FOODS, INC., AMERICOLD LOGISTICS, LLC, ASSOCIATED GROCERS, INC., ASSOCIATED WHOLESALE GROCERS, INC., BRUNO'S SUPERMARKETS, INC., CHENEY BROTHERS, INC., GORDON FOOD PRODUCTS CORP., McLANE COMPANY, INC., PIGGLY-WIGGLY CO., WINN-DIXIE STORES, INC., PENOBSCOT McCRUM, LLC and COUNTY SUPER SPUDS, INC.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Superior Court Of New Jersey Appellate Division**

## OPPOSITION OF PENOBSCOT MCCRUM, LLC TO PETITION FOR A WRIT OF CERTIORARI

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did Petitioner fail to raise and preserve in the state courts any argument about the applicability of federal law?

2. Does federal law apply to this case?

3. Is federal law on successor liability applicable to a case that does not involve federal law?

## CORPORATE DISCLOSURE STATEMENT

Penobscot McCrum, LLC does not have a parent corporation. It does not own 10% or more of any publicly held company.

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## STATEMENT OF THE CASE

This case has its origins with a company located in the State of Maine called Penobscot Frozen Foods, Inc. ("Penobscot"). Penobscot was engaged in the business of processing raw potatoes into specialty potato products. Over a period of many years, Penobscot borrowed millions of dollars from KeyBank Capital, Inc., a division of a large national bank that has extensive business dealings in Maine ("KeyBank").

Because Penobscot customers were located throughout the United States, Penobscot utilized third-party commercial shipping services to deliver its products. Alliance Shippers, Inc. ("Alliance") provided shipping services to Penobscot.

Penobscot encountered financial difficulties and went into default of its obligations to KeyBank. On April 29, 2004, KeyBank sold virtually all of the assets of Penobscot through two public foreclosure auctions. At the time of the auctions, Alliance owed several hundred thousands of dollars to Penobscot.

Penobscot McCrum, LLC, a Maine limited liability company ("McCrum"), made a bid for the assets at the foreclosure auctions. McCrum was the highest bidder at the two public foreclosure auctions. McCrum purchased the assets not only free and clear of the KeyBank lien but free and clear of all liens and encumbrances junior to KeyBank's liens, including any claims of unsecured creditors, such as Alliance. Contrary to the representations in the Petition, there is no evidence that KeyBank and McCrum entered

into any "secret bid agreement" or that the public foreclosure auctions were conducted "without disclosure."

Alliance commenced a lawsuit in New Jersey Superior Court for its unpaid shipping fees against Penobscot, McCrum and a number of consignees. The case was removed to the United States District Court for the District of New Jersey. The District Court remanded the case to the New Jersey Superior Court, holding there was no subject matter jurisdiction. Pet. App. D at 33a, 33b. The Federal District Court noted that Alliance, in its Complaint, did not allege a violation of any federal law, or even reference any federal law or interstate commerce.

The New Jersey Superior Court ruled that Maine law governed the question of whether McCrum was a successor to Penobscot. A trial took place in the New Jersey Superior Court. The Court entered judgment in the amount of $43,966.65 in favor of Alliance on its *quantum meruit* claim. Alliance then appealed the verdict to the New Jersey Appellate Division which affirmed the Decision. Pet. App. A at 1a-23a. Alliance then unsuccessfully sought certification with the New Jersey Supreme Court. Pet. App. F at 45a-46a.

Thereafter, Alliance filed this Petition for a Writ of Certiorari.

## REASONS FOR DENYING THE WRIT

### The Writ Should Be Denied Because Petitioner Failed To Raise And Preserve In The State Courts Any Argument About The Applicability Of Federal Law

Petitioner contends (Pet. at 10-29) that the New Jersey courts erred in failing to apply federal law in this case. Specifically, it asserts that the New Jersey courts erred in failing to apply federal law to its claim for freight transportation charges and in failing to apply federal common law to an issue of corporate successor liability.

Petitioner's claims are without merit, but more pertinently, this Court should not grant the Writ because Petitioner failed to raise any federal question in the Law Division. No federal question was raised in the New Jersey Superior Court. No federal question formed the basis of an appeal to the New Jersey Superior Court, Appellate Division. When Petitioner filed its Petition to the New Jersey Supreme Court, no argument was advanced that federal law applied.

This Court has consistently held that where the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation to the state courts, unless the aggrieved party can affirmatively show the contrary. *Exxon Corp. et al. v. Eagerton*, 462 U.S. 176, 181, 103 S. Ct. 2296,76 L. Ed. 2d 497 (1983).

**The Writ Should Be Denied Because Federal Law Does Not Apply To This Case**

Petitioner maintains that a collection action arising out of freight charges establishes federal question jurisdiction. As the United States District Court for the District of New Jersey ruled in this case, it does not. In 1983, the Supreme Court held that an action for mere collection of filed rate tariffs does create federal jurisdiction. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 1050, 103 S. Ct. 1495, 75 L. Ed. 2d 928, 1983 U.S. Lexis 4291, 51 U.S.L.W. 3703 (1983). That case, however, was decided prior to deregulation of the industry which occurred in 1995. That deregulation resulted in the ICC Termination Act of 1995. *See*, *Matthew Bender*, 4-20 Goods in Transit § 20.03. Currently, tariffs are no longer required to be filed for rail, air and mini motor carriers. *Id.* The *Thurston* decision was based on the premise that because the carrier's right to collect unpaid charges depended on filed rates and the Interstate Commerce Act requirements, the collection of filed rate tariffs created federal question jurisdiction. That is not the case now. Therefore, that decision is distinguishable and not applicable to a case like the one presently before this Court, where filed tariffs are not in any way involved. *See*, *Central Transp. Int'l v. Sterling Seating, Inc.*, 356 F.Supp. 2d 786, 790 (E.D. Mich. 2005).

**The Writ Should Be Denied Because Federal Law On Successor Liability Is Not Applicable To A Case That Does Not Involve Federal Law**

Petitioner asserts that federal common law should apply to the question of whether McCrum is liable as a successor to Penobscot. As indicated above, Petitioner never made that argument in the state courts. Indeed, Petitioner asserted that New Jersey state law should apply to the issue of successor liability. The state courts were never even presented any argument that federal law should apply.

Moreover, because federal law does not govern this case, as set forth above, the federal common law with regard to successor liability does not apply.

## CONCLUSION

For all of these reasons, the petition for certiorari should be denied.

Respectfully submitted,

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